IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, v. MARKEITH JOHN WEBB, Respondent.	CRIMINAL ACTION NO. 09-0755

OPINION

Slomsky, J. **June 24, 2014**

I. INTRODUCTION

On June 5, 2009, just before eleven o'clock in the morning, a lone gunman robbed the Lafayette Ambassador Bank located in Easton, Pennsylvania. On December 1, 2009, a grand jury returned an indictment against Defendant Markeith Webb ("Petitioner"), charging him with armed bank robbery, in violation of 18 U.S.C. § 2113(d). On January 13, 2010, Petitioner, while represented by counsel, participated in an off-the-record proffer with the Government where he admitted committing the robbery and provided details to corroborate his confession. (Doc. No. 148 at 4.) On May 26, 2010, after Petitioner became dissatisfied with his counsel, this Court appointed Petitioner new counsel ("Defense Counsel" or "Trial Counsel") to represent him in the case.

On November 10, 2010, a Superseding Indictment was returned, charging Petitioner with one count of armed bank robbery, in violation of 18 U.S.C. § 2113(d), and one count of using and carrying a firearm during an armed robbery, in violation of 18 U.S.C. § 924(c)(1). (Doc. No. 59.) On December 3, 2010, following a four-day jury trial, Petitioner was found guilty on both counts.

On December 16, 2010, Trial Counsel filed a Motion for Judgment of Acquittal and/or New Trial (Doc. No. 90), which was denied. (Doc. Nos. 107; 108.) Petitioner then became dissatisfied with Trial Counsel, and a third counsel was appointed.

On July 7, 2011, Petitioner was sentenced to a prison term of 199 months to be followed by a five-year term of supervised release, and ordered to pay restitution in the amount of $4,665 and a special assessment of $200. On July 15, 2011, Petitioner's new counsel filed a timely appeal to the Third Circuit Court of Appeals. (Doc. No. 131.) On September 27, 2012, the Third Circuit affirmed Petitioner's conviction and sentence. United States v. Webb, 499 F. App'x 210, 211 (3d Cir. 2012) cert. denied, 133 S. Ct. 1475 (2013).

On January 23, 2014, Petitioner filed a pro se 28 U.S.C. § 2255 Motion to Vacate, Set Aside, or Correct [his] Sentence, alleging violations of his Sixth Amendment right to effective assistance of counsel by Trial Counsel, and his due process rights as a result of prosecutorial misconduct.[1] (Doc. No. 144.) On March 20, 2014, the Government filed a Response. (Doc. No. 148.) On April 21, 2014, Petitioner filed a Reply. (Doc. No. 153.) For reasons that follow, the Court will deny the § 2255 Motion.

II. EVIDENCE PRESENTED AT TRIAL

During the trial, jurors heard testimony from four eye-witnesses to the robbery: bank employees Shaprese Thomas ("Thomas"), Sally Chrin ("Chrin"), and Alexandra Jimenez ("Jimenez"), and a bank customer, Joseph Lombardo ("Lombardo"). While testifying, they viewed video surveillance recordings recovered from the bank, which show an African American male committing the robbery. He wore gloves and a mask over the lower portion of his face and

[1] The pro se Petition is a rambling one which the Court viewed liberally so that all allegations would be considered.

was holding a gun. Together, the video surveillance and testimony confirm the sufficiency of the evidence to support the convictions on both counts of the Superseding Indictment. A more detailed discussion of the facts follows, including the compelling corroborating evidence.

The robber entered the bank with a gun. Lombardo, who is familiar with guns, testified that he thought the robber carried a .9 millimeter black semi-automatic handgun. (December 1, 2010, Trial Transcript ("12/1/10 Tr.") at 117:15-18.) The robber banged his gun on a half-door separating the public from the tellers and then jumped over the half-wall. (Id. at 63:1-5; 64:6-17; 111:19-25; 142:3-7; 168:4-14.) When he landed, his mask slipped down for a moment and exposed his face. (Id. at 112:14-17; 148:20-149:2; 169:4-14.)

The robber pointed his gun at each bank employee's face as he demanded that they turn over the money from their teller drawers. (Id. at 144:1-7.) Approximately $4,665 was stolen, including two dye-pack security devices, designed to release red dye and tear gas when carried a certain distance from the bank. (Id. at 144:10-11.)

After taking the money, the assailant ran out of the bank. The employees watched him flee from the bank's drive-up window. (Id. at 67:1-10; 144:19-145:5; 170:17-22.) As they watched, they saw a dye-pack explode. (Id. at 67:1-10; 145:7; 170:24-25.)

A few days after the robbery, law enforcement officers showed bank employees Chrin and Thomas a photo array, and asked if they could identify the robber. (Id. at 159:22-15; 172:24-173:1.) Thomas identified Petitioner as the perpetrator in the photo array and later identified him at trial. (Id. at 173:11-176:6; 182:25-183:10.) Chrin was unable to identify Petitioner in the photo array, but did identify him in court. (Id. at 160:1-2.) Chrin and Thomas recognized the perpetrator as someone who had visited the bank with an elderly customer, Mattie Graham. (Id. at 149:7-22; 171:7-14; 172:4-16.) Evidence later established that Petitioner is the

grandson of Mattie Graham, and that Mattie Graham was a bank customer at the time of the robbery. (December 2, 2010, Trial Transcript ("12/2/10 Tr.") at 18:14-20:12; 155:3-11.) The third bank employee, Jimenez, was not shown a photo array and testified at trial that she did not see the assailant's face. (Id. at 65:2-8.) Thomas, Chrin and Jimenez described the robber as a tall, heavy-set African American man. (Trial Tr. 12/1/10 at 70:21-71:9; 148:14-17; 168:10-14.)

After the eye-witness testimony, the jury heard from a number of other witnesses, including Josephine Soriano ("Soriano") and Joseph Alonzo ("Alonzo"). Soriano testified that she is a former employee of the Square One Exxon on 15th Street in Easton, Pennsylvania (the "Exxon"). (Id. at 36:10-23.) Soriano knew Petitioner as a regular customer. (Id. at 55:13-17.) The day of the robbery, Soriano was at work when Petitioner entered and asked if she would exchange red-stained money for clean bills. (Id. at 55:18-56:23.) She exchanged approximately $300 for Petitioner, and placed the soiled money in an envelope. (Id. at 56:24-57:4.) Petitioner asked her to exchange more money but she refused. (Id. at 57:5-14.)

At trial, the jury was shown moving and still surveillance images from the cameras at the Exxon. (Exs. 24-32.) The images show an African-American male driving up to the Exxon in a green Chevrolet Malibu, entering, exchanging money, looking around, leaving, reentering, and ultimately driving off. (Id.) Soriano identified Petitioner as the man in the surveillance footage.

Alonzo is a police officer for the City of Easton. (Id. at 140:17-21.) He responded to the scene of the crime shortly after the robbery to help gather evidence. (Id. at 142:25-143:18.) At the scene, Alonzo was handed an envelope from Thomas with a brief description of the suspect written on it. (Id. at 159:22-160:6.) Later in the investigation, Alonzo compared this description with the description in Thomas' official police report and determined that they were the same.

(Id. at 170:7-25.) Because the descriptions were identical, Alonzo destroyed the envelope. (Id. at 160:13-15.)

On June 6, 2009, the day after the robbery, Alonzo obtained the red-stained bills from the Exxon after the store's manager called the police and reported that he had red-stained bills. (Id. at 143:22-144:24.) The money was sent to the FBI lab for testing and was later determined to contain traces of the same dye and tear gas that are used in bank security packets. (Id. at 179:20-180:22.)

Alonzo interviewed the Exxon manager, and Soriano and viewed the store's security footage. (Id.) Alonzo then assisted in obtaining a search warrant for a green Chevrolet Malibu that was parked outside the residence of Petitioner's long-time girlfriend. (Id. at 146:5-18.) A considerable amount of red stain appeared on the front seat of the vehicle. (Id. at 148:3-4.) Portions of the red-stained seats were sent to the FBI laboratory and tested positive for the same dye and tear gas used in bank security packets. (Id. at 179:20-180:22.)

When Petitioner was ultimately arrested, he was sitting in the passenger seat of a Dodge Avenger. (Id. at 122:22-123:10.) A total of $492 in red dye-stained bills was recovered from the Avenger at the time of the arrest. (Id. at 154:12-18.) The money recovered from the Avenger also contained traces of dye and tear gas used in bank security packets. (Id. at 179:20-180:22.)

III. STANDARD OF REVIEW

To evaluate Petitioner's claims of ineffective assistance of counsel in violation of his Sixth Amendment right, the court must apply a two-prong test enunciated by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). Under this standard, trial counsel is presumed to have acted reasonably and effectively unless Petitioner can show that: (1) Defense Counsel's performance was deficient, and (2) the deficient performance prejudiced Petitioner. Id. at 688,

694.

Under the first prong, Petitioner must show that Defense Counsel fell short of "reasonably effective assistance" by overcoming the presumption that Defense Counsel's decisions were "sound trial strategy." Id. at 686. The appropriate measure of attorney performance is reasonableness under prevailing professional norms. Id. There is a strong presumption that counsel rendered adequate assistance and that all significant decisions were made while exercising reasonable professional judgment. Id.

Under the second prong, Petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 687, 689, 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. at 694. The Petitioner must show that counsel's error caused more than just some conceivable effect on the outcome of the proceeding. Id. at 693.

"A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." Id. at 668. "Judicial scrutiny of counsel's performance must be highly deferential . . . [and] a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" Id. at 689.

In addition, "under § 2255, relief for prosecutorial misconduct is appropriate when the prosecutor's misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process." United States v. Mangiardi, 173 F. Supp. 2d 292, 303 (M.D. Pa. 2001) (quoting United States v. Walker, Nos. 94-488, 99-584, 2000 WL 378532, at *10 (E.D. Pa. April 4, 2000); Darden v. Wainwright, 477 U.S. 168, 181 (1986)) (internal citations omitted). "[F]or

due process to have been offended, the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial." Id. (citing Werts v. Vaughn, 228 F.3d 178, 197-98 (3d Cir.2000); Greer v. Miller, 483 U.S. 756, 765 (1987)) (internal citations omitted).

IV. PETITIONER HAS FAILED TO ESTABLISH THAT HIS TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE OR THAT THE GOVERNMENT ENGAGED IN PROSECUTORIAL MISCONDUCT

Petitioner alleges that Trial Counsel was ineffective by failing to: (1) object to the trial testimony of Sally Chrin, (2) object to Court Orders, (3) investigate alibi witnesses, (4) have Petitioner medically evaluated, and (5) appeal his conviction on various grounds. Petitioner also alleges that the Government engaged in prosecutorial misconduct by allowing perjured testimony at trial. Each of Petitioner's claims will be discussed in turn.

A. Defense Counsel's Failure to Object to the Testimony of Sally Chrin Does Not Amount to Ineffective Assistance of Counsel

Petitioner's first claim for ineffective assistance of counsel is based on his attorney's failure to object to the testimony of Sally Chrin, a bank employee and eye-witness to the robbery. Petitioner argues that Trial Counsel should have objected to Chrin's in-court identifications of him. (Doc. No. 144 at 1.) He further argues that her in-court identifications were inadmissible because of her failure to identify Petitioner during a pre-trial photo array. (Id.)

As noted above, on June 8, 2009, law enforcement officers asked Chrin to identify the assailant in a photo-array. Chrin was unable to identify Petitioner. On July 28, 2010, after Chrin was named as a potential witness, Defense Counsel filed a Motion to Suppress the Anticipated In-Court Identifications of Chrin on the ground that her in-court identification would be impermissibly suggestive. (Doc. No. 39 at 3.) On August 2, 2010, the Government filed a Response, stating that the Motion was moot because the Government did not intend to ask Chrin

to make an in-court identification at trial. (Doc. No. 41.) On November 18, 2010, the Court held a hearing on the Motion and denied it as moot because of the Government's position.

On December 1, 2010, Chrin testified at trial. Although she never physically pointed to Petitioner as the robber, and was not asked by the prosecutor to do so, during her direct examination there were a number of times when she used the words "the defendant" when referring to the robber. On direct examination, she began her testimony as follows:

> Q: Please tell us what happened.
>
> [Chrin]: . . . My eye was caught by the defendant. He was coming into the bank very fastly [sic] . . . .
>
> * * *
>
> [Chrin]: . . . when the defendant came in to rob me . . . .
>
> * * *
>
> [Chrin]: That's how much [money] the defendant got out of my top drawer.

(12/1/10 Tr. at 141:18-25; 147:25; 148:6-7.)

The prosecutor then asked Chrin to describe the robber's physical characteristics and her other observations during the robbery. The following exchange occurred:

> Q: Physically, can you describe the – the man that you saw rob the bank on June 5, 2009?
>
> [Chrin]: Yes. He was a black male, and, again, I – I, myself, am 5'2'', so I said he was maybe about five feet, eight. He seemed heavyset to me. I'm not really good with weight, so I said maybe about 260 pounds.
>
> Q: And you mentioned a mask. Could you describe that for the jury, please?
>
> [Chrin]: Yes. It was a handkerchief that you could buy in Wal-Mart. And when he did jump over the counter, the handkerchief

> did fall when he was coming across, leaping over the wall, and landing on the counter next to Alexandra.
>
> Q: Did you have the opportunity to observe that from where you were?
>
> [Chrin]: Yes. Oh, yes.
>
> Q: Was he – what did he have in his hands?
>
> [Chrin]: He had a gun in his hand, and he had gloves on.
>
> Q: And you saw that?
>
> [Chrin]: Yes, I did.

(Id. at 148:12-149:6.)

Immediately following this testimony, the prosecutor asked Chrin if there came a point when she realized that she recognized the man whose mask came down. The transcript reflects the following:

> Q: Ms. Chrin, did there come a point that you realized that you had recognized the man whose mask came down?
>
> [Chrin]: Yes.
>
> Q: And when did you realize that?
>
> [Chrin]: After he left the building.
>
> Q: And who did you realize it was?
>
> [Chrin]: I could not put a name to the face, but I knew that he had – and his voice was very familiar, because he had come in there prior. And after I thought about it, just trying to – again, when you see anybody on the street, try to realize where you know this person from, I realized that I recognized him from coming into the bank with his grandmother.
>
> Q: And was his grandmother a customer?
>
> [Chrin]: Yes.

Q: Did you remember the grandmother's name?

[Chrin]: Not at the time, I did not.

Q: Were you able to find out – figure out what the grandmother's name was since then?

[Chrin]: Yes.

Q: And what is the name?

[Chrin]: Mattie Graham.

(Id. at 149:7-150:4.)

Thereafter, Chrin continued her direct testimony, again referring to "the defendant" as the robber:

[Chrin]: When the defendant first jumped on the counter with Alexandra, there was a customer standing in front of her at that time.

* * *

Q: [viewing the bank surveillance video] Just – just about 10:57. You can tell us, if you know, what was happening at this point.

[Chrin]: Oh, well, there would be the defendant going into my drawer taking the money out of it.

* * *

Q: [viewing the bank surveillance video] And do you see yourself in there?

[Chrin]: Yes, I'm in the far – and there is the defendant coming in. And, again, he's reaching into my drawer. And then, yes, I moved out of his way, then.

* * *

[Chrin]: There would be the defendant walking out with the money from my drawer.

(Id. at 150:14-154:12.)

The record is unclear as to when exactly Chrin realized that she could identify Petitioner as the robber. It is clear, however, that the Government, in questioning Chrin, did not ask her whether Petitioner was the robber. She volunteered it. It was only after Chrin referred to "the defendant" as the robber that the Government asked her if there came a point when she realized that she recognized the man whose mask came down.

Defense Counsel did not object to Chrin's identification of Petitioner. Instead, he chose to impeach her identification on cross-examination. First, he attacked Chrin's statement that she saw the robber's mask fall. He handed her a report that she had given to the police and asked her the following:

> Defense Counsel: Does [the report] fairly and accurately recite what you told the police on June 5th?
>
> [Chrin]: As best I can recall, yes.
>
> Defense Counsel: Could you point out, then, Ms. Chrin the part [the report] where you told the police officer that the mask slipped?
>
> [Chrin]: That it was here?
>
> Defense Counsel: That his mask slipped, as you - - as you told us on direct examination –
>
> [Chrin]: Correct.
>
> Defense Counsel: - - the mask - - the handkerchief fell, were your words. Just - - if you could, just point out - - read to the jury that portion of [the report] where you told the police officer on June 5, 2006 that the mask - - or the handkerchief fell.
>
> [Chrin]: I don't see that it's here.
>
> Defense Counsel: It's not in there, is it?
>
> [Chrin]: No.

(Id. at 157:3-20.)

Defense Counsel also attacked Chrin's credibility by inquiring about her failure to identify Petitioner in the pre-trial photo-array:

> Defense Counsel: Now, there - - there came a time, did there not, when you were shown a series of photographs of African American men, correct?
>
> Chrin: Yes.
>
> Defense Counsel: And were you able to pick anybody's picture out of that series of photographs?
>
> Chrin: No.

(Id. at 159:22-160:3.)

Finally, Defense Counsel impeached Chrin's memory, inquiring as to how many persons she saw each day at the bank:

> [Chrin]: [reading from a police report] "Chrin reported that she believes that the suspect possibly – is possibly a customer of the bank from possibly recognizing his voice and physical appearance."
>
> Defense Counsel: You said "possibly." You weren't sure, though, were you, Ms. Chrin?
>
> [Chrin]: No. I was not.
>
> Defense Counsel: And how many customers do you think you've spoken to over the – however many years you've been there at the bank?
>
> [Chrin]: Well, daily, I probably wait on, roughly, 60 to 100 people per day.
>
> Defense Counsel: Per day. And how many years have you been there?
>
> [Chrin]: Going on – it's my fourth year.
>
> Defense Counsel: Okay. So five days a week. That's – 60 times five is 300 times – times 52 times whatever – it's a big number, correct?

[Chrin]: I'll trust your math, yes.

Defense Counsel: Well, you should not trust my math. I'm just asking you, that's a big number, correct?

[Chrin]: Yes. Customers come in. They're constant customers. The same people come in. We're a very small bank. And, again, Mrs. Graham gets escorted in. Again, she's a very nice lady. We – I – I remember my customers because they're frequent customers.

Defense Counsel: How frequently was my client in the bank?

[Chrin]: I saw him approximately three to five times in the bank.

Defense Counsel: Three to five times over a four-year –

[Chrin]: Over –

Defense Counsel: -- over an eight-year period – whatever number of years –

[Chrin]: No, I've only been there for four years.

Defense Counsel: So three to five times over four years?

[Chrin]: That's correct.

Defense Counsel: And 60 times whatever number of voices you hear every day, correct?

[Chrin]: I hear 60 voices a day?

Defense Counsel: 60 customers.

[Chrin]: That would be a good estimate.

(Id. at 163:9-165:3.) Based on Chrin's testimony and the Government's pre-trial representation that it would not ask her to make an in-court identification, Petitioner contends that his Trial Counsel was ineffective for failing to object to Chrin's identification of him.

When examining a claim of ineffective assistance of counsel, "[a] court need not first determine whether counsel's performance was deficient before examining the prejudice suffered

by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." Strickland, at 668.

Here, while the Court finds that Petitioner has failed to establish both deficient performance and prejudice, the Court will examine the lack of sufficient prejudice first. In order to establish prejudice, Petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 687, 689, 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. at 694. The Petitioner must show that counsel's error caused more than just some conceivable effect on the outcome of the proceeding. Id. at 693. In other words, Petitioner must show that, absent Chrin's identification, there is a reasonable probability that the jury would have found him not guilty.

While it might appear that an eye-witness identification would be critical to the outcome of a criminal case, this is not the situation here, given the substantial evidence of guilt introduced against Petitioner at trial. Bank employee Thomas was certain about her identification of Petitioner as the robber. She selected him out of a pretrial photo array as the robber and observed him from a close distance during the robbery when his mask dropped. She confirmed that the mask did drop and that she recognized him as someone who accompanied Mattie Graham to the bank. Evidence was introduced that Mattie Graham was in fact a customer of the bank at the time of the robbery and that Petitioner was her grandson. Further, Petitioner matched the physical description of the robber given by Thomas and Jimenez of a tall, heavy-set African American man. In addition, Thomas and Jimenez testified that they saw the red dye-pack explode on the robber as he ran from the bank.

The fact that witnesses saw the dye-pack detonate on the robber is of extra import, as stain from the dye appeared in several locations subsequent to the robbery, and each location led law enforcement officials to Petitioner. Exxon employee Josephine Soriano identified Petitioner as the man who entered the Exxon station mere hours after the robbery with red-stained money. He asked her to exchange the bills for ones that had no stain on them. Soriano testified that she recognized Petitioner as a frequent gas station customer. While viewing surveillance photos from the gas station, Soriano explained to the jury how Petitioner pulled up to the station in a green Chevrolet Malibu, entered the station, showed her the red-stained bills, and asked her to exchange them. When law enforcement discovered that Petitioner's girlfriend owned a green Chevrolet Malibu, they searched the car and found red-stain on the interior seats. When Petitioner was arrested, he was seated in the passenger side of a Dodge Avenger. Inside the car, next to Petitioner, law enforcement found more red-stained money. The red-stained items were sent to the FBI lab for testing, and all were determined to contain traces of dye and tear gas used in bank security packets. Given the substantial amount of evidence, there is no reasonable probability that sustaining Defense Counsel's objections to Chrin's identification would have resulted in a different outcome.

Notably, Strickland's prejudice prong sets a high bar, as illustrated by Collins v. Sec'y of Pennsylvania Dep't of Corr., 742 F.3d 528 (3d Cir. 2014). Collins was convicted of murdering his friend, Graves, in front of another friend, Cofer. Id. at 532-33. On the night of the murder, the three were driving around the neighborhood, looking for members of a rival gang. Id. at 533. Cofer was driving, Graves was in the front seat and Collins was in the back seat behind Graves. Id. Allegedly, Collins, without prompting, shot Graves in the back of the head with a .45 caliber handgun. Id. During Collin's state capital case, defense counsel's theory was that the gunshots

came from outside the car, and that either Cofer or a member of the rival gang shot Graves. Id. at 534. However, defense counsel "conducted no investigation whatsoever" to assist him in supporting his theory of the case. Id. at 547. "He interviewed no witnesses, including the one eye-witness, and instead cross-examined them cold at trial; he failed to interview the Commonwealth's firearms expert or obtain his own; and he did not engage any other forensic expert." Id. Regardless, the defendant's ineffective assistance of counsel claim against trial counsel failed. The state court found that even with counsel's errors, there was no indication that the outcome would have been different because of the substantial evidence of guilt against the defendant. Id. at 548. In making this finding, the state court relied on the following evidence of guilt: a medical examiner's testimony that the shooter was behind the victim, incriminating letters written from the defendant to eye-witness Cofer just before trial asking him not to "snitch," evidence of blood found on the defendant's pants from the night of the shooting, defendant's ownership of a gun matching the caliber of the murder weapon, and a ballistics expert who testified during the post-trial PCRA hearing for the defendant and confirmed that the shots could have come from the back seat. The Third Circuit upheld the state court's finding that defense counsel was not ineffective, even though the court found his approach to the case "deeply troubling." Id. at 547, 548.

Like the defendant in Collins, Petitioner in this case faced a mountain of evidence against him. In view of the substantial evidence of guilt, even if Defense Counsel had successfully objected to Chrin's testimony, and she did not testify to the identification at trial, there is no indication that "the result of the proceeding would have been different." Strickland, at 688, 694.

Turning to Strickland's second prong, the deficient performance element, Petitioner has failed to establish that Defense Counsel's actions fell below reasonably prevailing professional

norms. Even though Defense Counsel did not object to Chrin's in-court identification, he did anticipate that she would make an in-court identification, given the title of his pre-trial "Motion to Suppress Anticipated In-Court Identifications." (Doc. No. 39.) In addition, at trial he was well prepared to cross-examine her and attacked her credibility, even though the identification may have been unexpected. Defense Counsel's actions were reasonable under the circumstances and not deficient. Therefore, Petitioner's first claim for ineffective assistance of counsel must fail.

B. Defense Counsel's Failure to Object to the Court's Orders Does Not Amount to Ineffective Assistance of Counsel

Next, Petitioner argues that Defense Counsel was ineffective because he failed to object to the following Court Orders: (1) a November 26, 2010 Order denying Petitioner's Motion for a Franks Hearing[2] (Doc. No. 75), and (2) a March 29, 2011 Order denying Petitioner's Motion for Acquittal and/or New Trial. (Doc. No. 108.) Petitioner claims that Defense Counsel should have objected to these Orders and the corresponding Opinions of the Court because the Opinions were based on "misstated facts." (Doc. No. 144 at 27.) Essentially, Petitioner argues that a number of witnesses committed perjury, and therefore the factual findings of the Court were incorrect.

Both of these Motions were fully briefed by the parties, and both were decided after hearings before the Court. (Doc. Nos. 58, 67, 73, 90, 100, 103.) In addition, the Court wrote

[2] Derived from Franks v. Delaware, 438 U.S. 154 (1978), a Franks hearing is held when a defendant "makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and . . . the allegedly false statement is necessary to the finding of probable cause." Id. at 155-56. If perjury or reckless disregard is established at the hearing, and, "with the false material set to one side, the affidavit's remaining content is insufficient to establish probable cause," the search warrant and all fruits of the search will be excluded from evidence. Id.

two detailed Opinions explaining the reasoning behind each denial. (Doc. Nos. 74, 107.) In its Opinion denying Petitioner's Motion for Acquittal and/or New Trial (Doc. No. 107), the Court based its factual findings on the testimony and evidence presented at trial. There is no evidence that the testimony presented at trial was perjured or insufficient to support the verdict.

As to the Court's Opinion denying Petitioner's Motion for a Franks Hearing (Doc. No. 74), the Court's decision was affirmed by the Third Circuit:

> Webb offered no evidence in support of his request for a Franks hearing, and the District Court accordingly determined that he had failed to make a substantial showing that the affidavits reflected false statements that were made knowingly and recklessly. We agree with the District Court.

Webb, 499 F. App'x at 212.

Because there is no evidence to support the claim that the testimony and other exhibits presented to the Court were fraudulent or perjured, Defense Counsel's failure to object to the Court's denial of a Franks hearing based on "misstated facts" was not deficient. Accordingly, Trial Counsel's actions did not "fall below an objective standard of reasonableness."[3] Strickland, at 688.

[3] In the middle of his second argument, Petitioner has inserted a section labeled "Judicial Bias." (Doc. No. 144 at 30.) Under this heading, Petitioner briefly summarizes the hearing held on Petitioner's Motion to Suppress Anticipated In-Court Identifications, discussed above, and then quotes extensively from 18 U.S.C. §1621 ("Perjury Generally") and 18 U.S.C. §1623 ("False Declarations Before Grand Jury or Court"). It appears that Petitioner is claiming that the Court's denial of: (1) his Motion to Suppress Anticipated In-Court Identifications, (2) his Motion for a Franks hearing, and (3) his Motion for an Acquittal and/or New Trial, amounts to judicial bias. In order to establish bias, Petitioner must prove that the trial Judge had a ". . . personal bias against petitioner or [a personal bias against] any class of which petitioner is a member." U. S. ex rel. Perry v. Cuyler, 584 F.2d 644, 648 (3d Cir. 1978). These are unsupported allegations and are without merit.

C. Defense Counsel's Failure to Investigate Alibi Witnesses Does Not Amount to Ineffective Assistance of Counsel

Next, Petitioner argues that Defense Counsel "failed to investigate four alibi witnesses that [Petitioner] provided for him by a rebuttal affidavit." (Doc. No. 144 at 44.) Petitioner claims that these four unnamed individuals would have been able to provide him with an alibi for the robbery. Defense Counsel's failure to investigate these witnesses was reasonable, given the circumstances. As noted above, Petitioner provided a written proffer statement to the Government, in which he admitted robbing the bank. The proffer contained a clause that any statements made by Petitioner during the proffer meeting could be used by the Government at his trial in response to "representations through counsel materially different [sic] from statements made or information provided during the 'off-the-record' proffer." (Doc. No. 148 at 3.) If Defense Counsel had presented alibi witnesses at trial, the Government could have used Petitioner's proffer statement against him. Avoiding this outcome was "sound trial strategy." Strickland, 466 U.S. at 689. Additionally, Defense Counsel was precluded from assisting Petitioner with his attempt to present false alibis to the Court. Nix v. Whiteside, 475 U.S. 157, 166 (1986) ("Although counsel must take all reasonable lawful means to attain the objectives of his client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law.") Accordingly, Petitioner's third claim of ineffective assistance of counsel also fails.

D. Defense Counsel's Failure to have Petitioner Medically Evaluated Does Not Amount to Ineffective Assistance of Counsel

Petitioner also maintains that his counsel was ineffective for failing to have him medically evaluated before trial. Petitioner claims that he suffered a brain aneurysm in April, 2009, and often had problems focusing and comprehending what was occurring in the

courtroom. (Doc. No. 144 at 66-67.) He also claims that he was shot several times in the leg which prevented him from leaping over a countertop, like the robber did in this case. (Id. at 66.)

The test of a defendant's competency to stand trial is "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding- and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 402 (1960). Here, Petitioner has not alleged that he was unable to consult with his lawyer or that he did not understand the proceedings against him. The Court observed Petitioner during pretrial proceedings and at trial, and Petitioner did not display any inability to stand trial as a competent defendant. Accordingly, Defense Counsel's decision not to have him medically evaluated does not fall below an objective standard of reasonableness. Strickland, at 688.

Moreover, Petitioner's argument about his inability to commit the crime is again undermined by his proffer statement, where he admits leaping over the counter during the bank robbery. If Defense Counsel had presented evidence that Petitioner was medically incapable of performing this action, then the Government could have admitted Petitioner's proffer statement because it contradicts the claim of his inability to commit the crime for a medical reason. Avoiding this outcome was "sound trial strategy." Strickland, 466 U.S. at 689. In addition, as noted previously, Defense Counsel was precluded from assisting Petitioner in his attempt to present false evidence to the Court. Nix, 475 U.S. at 166. Consequently, Defense Counsel's failure to have his client medically evaluated does not amount to ineffective assistance of counsel.

E. Defense Counsel's Motion for Acquittal and/or New Trial Adequately Raised Petitioner's Claims and Does Not Amount to Ineffective Assistance of Counsel

Petitioner's next claim of ineffective assistance of counsel is based on Defense Counsel's failure to file a post-trial motion for acquittal based on: (1) insufficient evidence, (2) destruction of evidence, and (3) Joseph Lombardo's designation as an expert. However, Defense Counsel did raise in the Motion for Judgment of Acquittal and/or New Trial two of these arguments. (Doc. No. 90.) First, in the Motion, Defense Counsel argued that the evidence presented at trial was insufficient to establish Petitioner's guilt beyond a reasonable doubt. This argument was rejected by the Court because, as noted, the evidence of guilt was substantial. (See Doc. No. 107.)

Defense Counsel also raised the argument regarding the alleged destruction of evidence. At trial, Defense Counsel presented evidence that shortly after the robbery Thomas wrote a description of the perpetrator on an envelope and gave that envelope to an officer, who in turn gave the envelope to Detective Alonzo. (12/1/10 Tr. at 188:3-24; 12/2/11 Tr. at 160:7-9.) Detective Alonzo then compared the description of the perpetrator written on the envelope with the description written in Thomas' police report and determined that the descriptions were identical. Based on the comparison, Detective Alonzo did not retain the envelope as evidence. (12/2/11 Tr. at 160:8-18.) In his Motion, Defense Counsel argued that the disposal of the envelope amounted to destruction of exculpatory evidence. The Court ruled, however, that Detective Alonzo had not acted in bad faith when he destroyed the envelope and that therefore no due process violation was established. (Doc. No. 107); see also Arizona v. Youngblood, 488 U.S. 51, 58 (1988) ("We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial

of due process of law."). This ruling was later affirmed by the Third Circuit:

> Webb has not proven that the Government acted in bad faith. Detective Alonzo testified that the descriptions of the robber on the envelope matched the description given him by the same teller later in his investigation. There was no need to keep the repetitive notes on the envelope and discarding it does not rise to the level of an intentional act necessary to gain a tactical advantage over Webb. Therefore, the District Court did not err by denying Webb's motion.

Webb, 499 F. App'x at 213.

Because Defense Counsel did in fact file a Motion for Acquittal and/or New Trial and raised these two issues requested by Petitioner, his conduct did not fall below an objective standard of reasonableness.[4] (Doc. No. 90 at 20-22.)

Finally, Petitioner argues that Defense Counsel was ineffective for failing to challenge Joseph Lombardo's designation as an "expert" in his Motion for Acquittal and/or New Trial. (Doc. No. 144 at 74.) Lombardo was never designated as an expert witness. As discussed above, Lombardo was an eye-witness to the robbery. The Government presented Lombardo, in part, to establish that the assailant was carrying a gun. Lombardo provided testimony as a lay

[4] Petitioner also claims that Defense Counsel was ineffective for failing to object to the "unnecessarily suggestiveness of the identification after . . . Alonzo admitted in open court to destroying and changing the identification." (Doc. No. 144 at 10.) It appears that Petitioner is arguing that Alonzo somehow influenced Thomas' and Chrin's identifications when he destroyed Thomas' note. However, Chrin and Thomas identified Petitioner after seeing his face during the robbery and remembering that he had accompanied his grandmother to the bank in the recent past. Their identifications were not based upon any action of Detective Alonzo. Accordingly, the testimony does not support a claim for suggestive identification in this case, and Defense Counsel was not deficient for failing to object to the bank employees' testimony. See Neil v. Biggers, 409 U.S. 188, 199-200 (1972) (The factors to be considered when evaluating a claim of suggestive identification "include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.").

witness that he was very familiar with guns, and that based on his familiarity, he concluded that the assailant carried a .9 millimeter during the robbery. See Fed. R. Evid. 701 (A lay witness may give opinion testimony if it is "rationally based on the witness's perception.") Defense Counsel could not have objected to Lombardo's designation as an expert because the designation never occurred. Therefore, his failure to object did not fall below an objective standard of reasonableness.

F. The Government's Inquiry Into the Basis of Sally Chrin's Identification Does Not Amount to Prosecutorial Misconduct and There Is No Evidence of Perjury

Petitioner's last claim is for prosecutorial misconduct. He attacks the Government's conduct in allowing Sally Chrin to identify Petitioner as the robber after she failed to select him in a pre-trial photo array. He claims that Chrin could not identify him as someone whom she saw in the bank before the robbery. He contends that by allowing this testimony and other evidence, the Government engaged in prosecutorial misconduct through the use of perjured testimony and a new trial is warranted.

"Under § 2255, relief for prosecutorial misconduct is appropriate when the prosecutor's misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process." United States v. Mangiardi, 173 F. Supp. 2d 292, 303 (M.D. Pa. 2001) (quoting United States v. Walker, Nos. 94-488, 99-584, 2000 WL 378532, at *10 (E.D.Pa. April 4, 2000); Darden v. Wainwright, 477 U.S. 168, 181 (1986)) (internal citations omitted). "[F]or due process to have been offended, the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial." Id. (citing Werts v. Vaughn, 228 F.3d 178, 197-98 (3d Cir.2000); Greer v. Miller, 483 U.S. 756, 765 (1987)) (internal citations omitted).

Here, the Government's conduct did not deny Petitioner due process. As noted above, the Government never asked Chrin to make an in-court identification at trial. Her identification was not prompted by the Government. It was only after Chrin referred to "the defendant" as the robber that the Government asked her if she reached a point when she realized that she recognized the perpetrator. When confronted with a witness who makes an identification during her testimony, it is not improper for the Government to ask this question and for the witness to explain the basis for her recognition. If no basis was given, the jury would be left to speculate on a basis for the identification. There is no evidence that Chrin's identification of "the defendant" was perjurious, since she explained the basis for her identification, which was adequately attacked at trial by Defense Counsel.

Petitioner also argues that Chrin committed perjury when she said that she recognized Petitioner as a man she had seen "three to five times in the bank" over the length of her employment, from 2005-2009. (12/1/10 at 164:15-23.) Petitioner argues that he was incarcerated during this time period, so Chrin's testimony was "an obvious lie." (Doc. No. 144 at 1.) First, from Petitioner's exhibits, it appears he was incarcerated from the end of 2005 until March, 2009. (Doc. No. 144-1 at 17-18, 20.) The robbery occurred on June 5, 2009. Based on the timing of these events, there was an opportunity for Chrin to have seen Petitioner in the bank three to five times before the robbery, giving her a sufficient basis to identify Petitioner as the robber.

In a cursory fashion, Petitioner also argues that since Thomas' and Chrin's testimony contradicts Jimenez's testimony about the mask falling, the Government engaged in misconduct by offering any identification evidence. (Doc. No. 144 at 7.) Thomas and Chrin testified that they saw the assailant's mask come down. Jimenez testified that she did not see

his mask come down. The seemingly inconsistent eye-witness accounts were questions of fact for the jury as was the question of Chrin's credibility. Accordingly, Petitioner fails to show that the conduct of the Government resulted in an unfair trial.

V. CONCLUSION

For the foregoing reasons, Petitioner's 28 U.S.C. § 2255 Motion to Vacate, Set Aside, or Correct the Sentence will be denied. No hearing is warranted and no certificate of appealability will be issued.[5] An appropriate Order follows.

[5] Under 28 U.S.C. § 2253(c)(2), a "certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). For the reasons stated in the foregoing Opinion, Petitioner has not made such a showing. Therefore, a certificate of appealability will not be issued. See United States v. Pinnock, No. 09-1309, 2011 WL 465570, at *5 (W.D. Pa. Feb. 4, 2011).